IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., MASSATI,J.A., And MANDIA,J.A.)

CIVIL APPLICATION NO. 99 OF 2011

SELINA CHIBAGO.....APPLICANT

VERSUS

FINIHAS CHIBAGO.....RESPONDENT

(Application for leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Dodoma)

(Mjasiri, J.)

Dated the 8th day of September, 2006
in
Civil Appeal No. 2 of 2005

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REASONS FOR THE DECISION

MASSATI, J.A:

On the 10th July, 2013 we heard the parties and immediately allowed the application for leave to appeal but reserved the reasons for the said decision. We now give our reasons.

Briefly the parties were wife and husband, respectively. The respondent had petitioned for dissolution of marriage in the District court of Dodoma in Matrimonial cause No 7 of 2004. The applicant also cross-

petitioned for divorce, custody of children, and division of matrimonial assets among other reliefs. She was represented by Mr. Njulumi, learned counsel. On 17th September, 2006, S.J. Awasi, PRM made the following order:-

> " *As both the petitioner and the Respondent had agreed on the issue of dissolution of their marriage, the marriage is hereby dissolved. A decree of divorce is to be issued"*

The court then proceeded to issue ancillary reliefs on division of matrimonial assets and maintenance of the issues of the marriage.

Aggrieved by the decision of the District court, particularly in respect of orders of maintenance and distribution of matrimonial assets, the applicant instructed her counsel, who filed an application for review of the decision under section 78(a) of the Civil Procedure Code 1966. The application was heard by R.M. Kibella, R.M,(as he then was) who handed down his decision on 3.2.2008, which did not please the respondent. Through the services of Mr. Raymond Ruhumbika, learned counsel, he appealed to the High Court, where Mjasiri J. (as she then was) allowed the appeal. The applicant was displeased by the outcome of the appeal. She filed a notice of appeal, and applied for leave to appeal in the High Court. Masanche J. (as he then was) rejected it on 31/5/2007. After failing to get

Court finally, on 11th July, 2011 allowed her to file her application for leave to appeal out of time. That she did, and it is what we heard on the 10th July, 2013.

The application is by notice of motion filed under section 5(1)(c) of the Appellate Jurisdiction Act Cap 141, RE 2002 and Rule 45(b) of the Court of Appeal Rules, 2009. Three grounds were cited in support of the application. They were as follows:

1) The High Court Judge erred in law in blessing the decisions and orders of AWASI PRM, of Dodoma Resident Magistrate Court which decision, and orders mere made without hearing the parties to the suit.
2) The High Court Judge erred in law when it did not consider the fact that the trial Resident Magistrate did not consider the issue of the maintenance of the infant children after it was established by evidence that all the issues of the said marriage were infants.
3) That the trial Magistrate erred in law in determining the distribution of the matrimonial assets without following the statutory grounds:

It was supported by her affidavit, in whose paragraphs 2 "4" and 5 she literally repeats the same grounds:-

The application is officially opposed by the respondent, who through his counsel, Mr. Ruhumbika filed a "counter affidavit" to oppose the counter affidavit. (In the Court of Appeal Rules, we have "affidavit in reply" not "counter affidavit"). in paragraph 2 of the "counter affidavit" the respondent "argues" that as the applicant consented to the orders of divorce, custody, and distribution of matrimonial assets, the intended appeal has no merit. He repeats the same prayers in paragraph 3 of the "counter affidavit". In paragraph 4, the respondent proposes that as the Court of Appeal will " have no material to adjudicate upon," the applicant would best be advised to go back to the trial court to seek redress for her woes.

At the hearing of the application, the applicant appeared in person and adopted her written submission. She submitted that although it is on record that divorce was by consent, there was, in fact, no such consent. She prayed that it would be in the interests of justice if she would be granted leave to appeal.

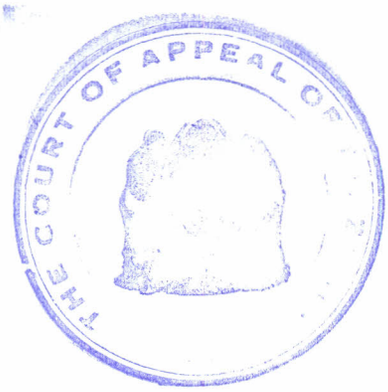
On his part, Mr. Ruhumbika initially resisted the application; arguing that the applicant was estopped by conduct from challenging the divorce and the ancillary orders as they were given with her or her counsel's, consent. Eventually however, the learned counsel, conceded, rightly so in

Considering the nature of the case before us, the way it was handled by the lower courts and in particular, on the need for a correct interpretation of section 99 of the Law of Marriage Act, 1971, considering its impact on society, we are satisfied that this is a case which merits a serious consideration by the Court of Appeal.

Accordingly, leave to appeal is granted. The appeal is to be lodged within 60 days from the 10th July, 2013.

Order accordingly.

DATED at **DAR ES SALAAM** this 16th day of July, 2013.



J. H. MSOFFE
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. M. KENTE
REGISTRAR
COURT OF APPEAL